SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~620~~ 20

BENNIE DANIELS AND LLOYD RAY DANIELS,
Petitioners,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

PETITIONERS' REPLY BRIEF

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against

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I

In Points I and II of his argument, respondent contends that neither the jury nor the confessions questions may be the subject of collateral attack by federal habeas corpus. Matters pertaining to the exclusion of Negroes from juries, according to respondent, "are considered as irregularities" and the admission into evidence of coerced confessions "are viewed as matters of evidence" and therefore neither is the subject of federal habeas corpus review. In the light of the authorities and principles discussed by petitioners in their main brief on the scope of federal habeas corpus review of state court convictions, we think the foregoing argument by

respondent to be so specious as virtually to amount to a concession that federal habeas corpus is an appropriate remedy for the matters here raised. Indeed, in view of the heavy reliance placed by petitioners upon the recent decision of this Court in *Jennings* v. *Illinois*, 342 U. S. 104, and the total absence of any reference to or discussion of that case by respondent, we think that for purposes of this case respondent has acknowledged that the kind of questions here raised are the kind of questions proper for consideration on federal habeas corpus.

II

On the question of the exclusion of Negroes from Pitt County juries, the respondent suggests that since petitioners pleaded to the bill of indictment without having first moved to quash the bill, the petitioners waived any objections to the selection of the grand jury. The motion to quash was, in fact, made after petitioners pleaded to the indictment, and it is furthermore true that under local practice the failure to move to quash prior to pleading to the indictment could constitute a waiver of the right to challenge the composition of the grand jury. However, in this connection it should first be pointed out that petitioners pleaded without moving to quash while represented by court-appointed counsel and before they were represented by counsel of their own choice (see 4 S. Tr. 2-3). Moreover, no objection was made by the prosecution upon the trial to the motion to quash on the ground that the motion was not timely, nor did the prosecution offer any objection for that reason to the introduction of evidence by petitioners as to the exclusion of Negroes from the grand jury. Indeed, the trial court permitted without comment the introduction of such evidence and at the conclusion of the trial made its findings of fact and conclusions of law exclusively in terms of the insufficiency of the evidence to estab-

lish discrimination (see 4 S. Tr. 1-22).[1] While the trial court could have, under local law, dismissed the motion as untimely and that ruling would have been discretionary and non-reviewable, the trial court did pass upon the motion on its merits and therefore the ruling was reviewable as if the motion had been timely (*State* v. *DeGraff*, 113 N. C. 689, 690, 691; *State* v. *Miller*, 100 N. C. 544, 545). In view of the failure of the prosecution to raise any objection to the motion to quash on the grounds of untimeliness, and in view of the circumstance that the trial court without comment permitted petitioners to make the motion to quash and to introduce evidence thereon and thereafter ruled on the motion on its merits, respondent may not now avoid a consideration on the merits of the exclusion of Negroes from the grand jury for any alleged failure by petitioners to make timely motion to quash (cf. *United States* v. *Ju Toy*, 198 U. S. 253, 261). In any event, as the challenge to the array of petit jurors was timely, the demonstration of the intentional discrimination against Negroes in the selection of petit juries in Pitt County is properly before the Court and by itself warrants the relief sought by petitioners.

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[1] At the conclusion of the hearing on the discrimination question the trial court did orally state as follows:

> "The Court: I am holding that in the manner and method of selecting a jury the board of County Commissioners have not intentionally or otherwise discriminated in any respect or any way or against any person by reason of race, color or creed of servitude, and the motion to quash having been made after the plea to the indictment it comes at a time when the defendant cannot insist upon it as a matter of right but at which the ruling is in the discretion of the court and for that reason I am dismissing and will sign formal order in writing and give you an exception to it (S. Tr. 167).

It is unclear whether the expression "for that reason" refers to the finding that there was no discrimination or the lack of timeliness. In view of the more formal findings and rulings (4 S. Tr. 1-22), which are premised *entirely* upon an absence of the showing of discrimination, it may be concluded that it was the intention of the trial judge to base his decision upon the evidence rather than the time when the motion to quash was made.

The discussion by respondent concerning the evidence on the exclusion of Negroes from juries in Pitt County, requires very little comment. Apart from the irrelevant animadversions by respondent to petitioners' "idealistic concepts" of the right of a Negro defendant to be free from discrimination against members of his race in the selection of jurors, respondent fails to offer any reason or explanation—plausible or otherwise—why less than 2% of the persons selected by the jury commissioners as eligible to serve as jurors were Negroes although the percentage of Negroes qualified for jury duty in Pitt County was patently far in excess of any such percentage.

Respondent would appear to suggest that a fair percentage of Negroes served on petit juries in Pitt County. That such could not have been the case is abundantly clear from the record. Thus the trial judge found that prior to 1947 no Negro had served on a grand jury in Pitt County in more than 20 years and "members of the Negro race were occasionally called, summoned and served for jury duty" (R. 307). These findings are of course accepted and not challenged by respondent. For the period from 1947 to 1949 grand and petit jurors were selected from the 1947 jury list, which list contained less than 2% Negroes—a calculation undisputed by respondent. Plainly, then, the number of Negroes who served on juries after 1947 was only infinitesimally greater than the number who served prior to 1947. Thus David T. House, Clerk of the Superior Court of Pitt County since July 3, 1945, testified that since his term of office there had been eleven drawings of grand juries yielding a total of 99 grand jurors, eighteen each year, and of the composition of those grand juries he said:

> "Q. During the time you have been clerk is my information correct that on the grand jury there have been no negroes?
>
> A. Yes, sir, there have not.

Q. There has not been one on the grand jury?
A. Not since 1945 until today.

The Court: How do you know that?
A. There is no record but I don't remember seeing one. My recollection is no negroes have served on the grand jury but there is no way of telling from my records because no distinction made between the two.

Q. You have been present at every grand jury sitting and every court since 1945?
A. Yes, sir.
Q. You have never seen a negro on the grand jury?
A. I don't recall one." (R. 121)

No substantial difference existed with respect to the composition of petit juries (see R. 127, 128).

III

In respondent's brief in opposition the alleged statement of facts and the alleged recital of the evidence in connection with the confessions admitted into evidence are argumentative in the extreme and are plainly calculated to convey the impression that the guilt of petitioners is plain and overwhelming. Petitioners have made every effort to confine their discussion of the evidence to facts not in controversy and where controversy concerning the evidence did exist the same was explicitly indicated. We think that the question of innocence or guilt is here irrelevant for neither innocence nor guilt is decisive of the propriety of the trial and other processes here challenged. *Lisenba* v. *California*, 314 U. S. 219, 236, 237; *Haley* v. *Ohio*, 332 U. S. 596, 599; *Malinski* v. *New York*, 325 U. S. 401, 404. Nevertheless petitioners deem it incumbent upon them to point out to the Court that the evidence heretofore adduced at the state trial and in the federal *habeas corpus* proceeding demonstrates not their guilt but, to the contrary, their innocence and the utiliza-

tion by local police officers of brutality and coercion as a substitute for civilized police methods.[2]

Upon their earlier petition for writ of certiorari, filed with this Court during the October Term, 1949, Misc. No. 412,—to which brief this Court is now respectfully referred—petitioners fully analyzed the evidence in the state court and demonstrated, conclusively we think, that the state's version of the petitioners' alleged participation in the murder of O'Neal is so utterly implausible as to be virtually incapable of credulity; that the confessions offered in evidence by the state are inconsistent with each other, are suspect because of the admitted circumstances by which they were obtained and, indeed, by their physical appearance, and each of the said alleged confessions has been convincingly denied by petitioners; and that petitioners proved by the testimony of a disinterested and, in fact, hostile witness, a complete alibi (see S. Tr. 553, 554; see also S. Tr. 555-563). In a further effort to impute guilt to petitioners respondent repeatedly refers to at least three other instances where each of the petitioners is alleged to have made, freely and voluntarily, oral confessions. Of course, even if such confessions had been made they would not rectify the erroneous admission into evidence of the written confessions which we have shown to be obtained under inherently coercive circumstances, *Stroble* v. *California*, 20 U. S. Law Week 4244. Moreover, the alleged proof of each of these alleged confessions is plainly prosecution-tailored.

The first of the confessions was said to have occurred,

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[2] Respondent's misleading recital of the evidence is demonstrated by his frequent reference to the fact that each of the petitioners was fully clad at the time each was apprehended—apparently to convey the suggestion that each was on the verge of or intended fleeing the arresting police officers. The testimony, at pages 203, 210-211, at the habeas corpus proceeding, by Sheriff Tyson directly contradicts any suggestion that petitioners, at the time each was apprehended, made any attempt to flee.

in the instance of each petitioner, almost immediately upon his apprehension. This Court will readily appreciate that, in view of its rule of passing upon confessions only on the basis of the uncontradicted and undisputed evidence, such testimony, if believed by a jury, renders such confessions virtually invulnerable under the Due Process Clause of the Fourteenth Amendment. Police officers intent upon obtaining confessions by third degree or other coercive measures would not cavil at testifying that immediately upon arrest a confession was uttered for by such testimony assurance can be obtained that a conviction, once had, will be virtually immunized from appellate review, and particularly review by this Court. These considerations strongly suggest the motivation for the implausible testimony of the police officers that petitioners, having been warned and advised fully by the police officers of their rights, including their right to remain silent, nevertheless without any inducement, promises, coercion or urging on the part of the police officers, fully and freely volunteered to acknowledge their guilt.

Similarly prosecution-tailored is the evidence belatedly proffered by the state that in May of 1949 the petitioner Lloyd Ray Daniels made a full confession to a social worker at the state mental institution where the petitioner was then lodged (see *Habeas Corpus* Transcript 234-235). The said alleged confession was made in May of 1949 and the trial of the petitioners was in June of that same year. Yet, although the aforesaid trial was widely publicized in the State of North Carolina, the alleged confession was reputedly not brought to the attention of the prosecution, nor was it offered in evidence. And, of course, this last mentioned alleged confession was dictated by the social worker out of the presence of the petitioner, Lloyd Ray Daniels, and was never seen or signed by the latter. *Habeas Corpus* Tran-

script, 236-237. With respect to this alleged confession, Lloyd Ray Daniels testified as follows:

"Q. You heard Mr. Johnson, Social Worker from the State Hospital yesterday say you confessed to him in Goldsboro that you committed this crime?

A. Yes, sir.

Q. Do you recall making any such confession to him?

A. No; sir.

Q. While in the hospital at Goldsboro were any drugs given to you?

A. Yes, sir.

Q. State what effect it had?

A. They give us some kind of shots in us arms and when they give you them shots you can't stand up and lay you down to give you the shot and when they give them to you you feel your mind and tension leaving you.

The Court: You mean memory?

A. Yes, sir. Your mind leaving you. They still talking to you about your mind just going away" (*Habeas Corpus* Transcript, 323, see also 233).

IV

Respondent construes petitioners' arguments concerning the discriminatory denial by the Supreme Court of North Carolina of an appellate remedy to be a special pleading on behalf of members of the Negro race. Respondent, apparently ever-conscious and ever-sensitive of racial considerations, would have this Court believe that petitioners are arguing that some special right to appeal in the courts of the State of North Carolina should belong to Negro defendants as compared with white defendants. And in support of respondent's position, all of the lawyers who have represented petitioners, with the exception of court-appointed counsel who saw fit not to challenge the composition of the grand jury, are flagellated in one manner or another as

solely and exclusively responsible for the present dilemma of petitioners.

It is hardly necessary to point out to this Court that respondent has misconstrued the import of the petitioners' argument. For we say that in all the circumstances the refusal by the North Carolina Supreme Court to exercise the discretion available to it, at the least to allow an appeal, was a denial of an appellate remedy in a manner and fashion violative of the Fourteenth Amendment. We do not suggest that the foregoing abuse of discretion was motivated by any racial or other obnoxious considerations. We point only to the fact that because of a one-day delay in the service of the case on appeal, which delay worked no prejudice to the prosecution and did not deprive the Supreme Court of North Carolina of its jurisdiction, that Court foreclosed to defendants in a capital case any appellate review of concededly substantial federal constitutional questions. As this Court remarked in *Neal* v. *Delaware*, 103 U. S. 370, 396: "'. . . with entire respect for the court below, . . . the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake . . .'"

V

Only one point in the argument of respondent concerning the effect of any alleged failure by petitioners to exhaust their state appellate remedy requires consideration. Respondent cites the decision of this Court in *Goto* v. *Lane*, 265 U. S. 393, as decisive on this point. According to respondent, that case is authority for the proposition that where there has been a failure to exhaust a state remedy and that remedy is no longer available, such failure is an absolute bar to a subsequent federal *habeas corpus* proceeding. We think that *Goto* v. *Lane* does not stand for such an extreme, formalistic position.

The petitioners there had been convicted in a territorial circuit court for the Territory of Hawaii on an indictment for an infamous crime against the laws of that Territory. In several instances the indictment ineptly and incorrectly used the disjunctive "or" instead of the conjunctive "and". Mr. Justice VAN DEVANTER noted for the Court that the foregoing error was not prejudicial to the defendants, nor had the indictment been challenged at the trial because of any alleged uncertainty—to the contrary, it was stipulated that the indictment be considered and understood as reading in the conjunctive instead of in the disjunctive and that any defect arising from the use of the disjunctive was waived. Apart from the stipulation, no change was made in the indictment proper. After conviction an appeal was taken and upon that appeal the indictment was challenged as uncertain and the stipulation as void as having had the effect of amending the indictment without resubmission to the grand jury. The conviction was not disturbed on the appeal; and of the foregoing contentions it was found that the stipulation had not acted to amend the indictment and that the indictment as drawn was not vague and uncertain. The defendants, having proceeded by a bill of exceptions, could not under the applicable decisions thereafter obtain review by the United States Supreme Court by writ of error; such review by the Supreme Court could have been had only if the convicted defendants had appealed in the first instance by writ of error instead of reserved exceptions; "The petitioners, however, elected to proceed the other way" (265 U. S., 401).

Goto v. *Lane* was in the foregoing posture when federal habeas corpus was sought. Upon the habeas corpus proceeding the same assertions of amendment and uncertainty of the indictment were raised.

It is immediately apparent, therefore, that at least two factors were present in *Goto* v. *Lane* which are not here

involved: (1) the point relied upon in the habeas corpus proceeding had been explicitly waived upon the trial; and (2) the defendants had knowingly, purposefully and intentionally followed an appellate course which precluded review by the United States Supreme Court of the constitutional questions raised (cf. *Parker* v. *Illinois*, 333 U. S. 571).

Moreover, notwithstanding the fact that the defendants in *Goto* v. *Lane* had themselves very narrowly confined the area of federal review, this Court nevertheless proceeded to a consideration of the issues in a manner which is strongly suggestive that despite the foregoing waivers, federal habeas corpus relief was not absolutely and completely barred. Thus it was said:

> "The instances in which it [federal habeas corpus] is granted, when the law has provided another remedy in regular course, are exceptional, and usually confined to situations where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void." (265 U. S., 401-402.)

Even more significantly, when Mr. Justice VAN DEVANTER came to consider the effect of the decision of the Court in *Ex parte Bain*, 121 U. S. 1, where it was held that the amendment of an indictment without resubmission to the grand jury renders the indictment void, Mr. Justice VAN DEVANTER did not say that habeas corpus must be denied for failure to appeal irrespective of whether the indictment was thus made void; instead he stated:

> "But, as was said by the supreme court of the territory, the indictment here was not amended. The purpose of the stipulation was not to alter or change the indictment, but to show that the parties construed and understood the accusation in a particular way, and desired the court to do the same. Had the court done

so without the stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted, it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects." (265 U. S., 402-403.)

In the circumstances, the decision in *Goto* v. *Lane* is the same decision which would have been rendered had a petition for habeas corpus been instituted after a timely filing of writ of error to the United States Supreme Court. The import of the decision in *Goto* v. *Lane* was that the *kind* of question raised was the kind which could be construed only upon an appeal and never upon habeas corpus; the fact that the time to appeal had expired and appellate review was therefore no longer available was not a basis for habeas corpus jurisdiction if such jurisdiction did not otherwise exist. And to the extent that in *Goto* v. *Lane* there was raised the kind of question cognizant in a habeas corpus proceeding, the Court proceeded to consider that question on the merits and made no allusion to the failure to appeal.

Goto v. *Lane*, and no other case decided by this Court, is authority for the proposition that the failure to exhaust appellate remedies no longer available, absent an affirmative waiver, is a bar to federal habeas corpus review where the petitioner—as here—raises questions of the kind and nature appropriate upon habeas corpus.

Conclusion

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review its judgment and that upon such review the judgment be reversed.

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